STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

~~THE~~ VILLAGE OF LINCOLN, ~~a Michigan municipal corporation,~~

Plaintiff/Appellee,

v.

VIKING ENERGY OF LINCOLN, INC.,

Defendant/Appellant.

Supreme Court Case No.:
Court of Appeals Case No.: ***246319***
Circuit Court No.: 00-10619 CE~~(K)~~

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APPLICATION FOR LEAVE TO APPEAL

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JUDGMENT APPEALED FROM AND RELIEF SOUGHT

The Defendant Viking Energy of Lincoln, Inc. ("Viking"), by its counsel, Honigman, Miller, Schwartz and Cohn, LLP, and McGuireWoods LLP, applies to this Court pursuant to MCR 7.302 for Leave to Appeal from a decision of the Court of Appeals dated August 24, 2004 (Addendum 1).

This case concerns whether a property owner is precluded from making a facial attack on the validity of an ordinance when the Village first attempts to apply the restrictions of that ordinance several years after its adoption and there is no evidence that the lapse of time has prejudiced the Village. The case arises out of efforts of the Village of Lincoln ("Village") to control the type of fuels that Viking may burn in its electrical generating plant in Lincoln, Michigan. The Lincoln Village Council adopted Ordinance 96-2 in February 1997, and, by that ordinance, attempted to freeze the mix and type of fuels that Viking may use to those that the State had permitted the plant to use at that time. Ordinance 96-2 also attempted to impose setbacks on the plant.

After the ordinance was adopted, the State environmental regulatory agency modified Viking's permit authorizing Viking to burn different fuel mixtures. After Viking began burning a different mixture as authorized by the State permit in the summer of 2000, the Village filed a Complaint in the Circuit Court of Alcona County in which it contended that Viking was in violation of Section 6 of Ordinance 96-2 regulating fuel mixture. Viking argued to the Circuit Court in its Motion for Summary Disposition that, inter alia, the entire Ordinance 96-2 was invalid as a result of the procedural flaws in the ordinance adoption process and, in addition, that the Village's attempt, through Ordinance 96-2, to regulate the plant's fuel use mixture was unconstitutional based on due process and equal protection grounds.

The Circuit Court held that Ordinance 96-2 violated the due process and equal protection clauses of the Michigan and United States Constitutions and invalidated the entire ordinance on those grounds. Although the Court declined to rule on the issue of the procedural flaws in the adoption process, the Court held that Viking was not precluded by public policy or time from bringing such claims.

The Village appealed the Circuit Court's decision. On appeal, Viking renewed its arguments that Ordinance 96-2 was procedurally flawed and was unconstitutional and invalid on other grounds as well.

The Court of Appeals, on August 24, 2004, upheld the Circuit Court's rejection of the Village's fuel restrictions on the basis that Section 6 (the fuel mixture provision) was unconstitutional as applied. However, noting that the Village had not sought relief as to the setback provisions, the Court of Appeals reversed that portion of the lower court's decision relating to the remaining provisions of Ordinance 96-2. The Court of Appeals rejected Viking's argument that the entire ordinance was invalid due to procedural flaws holding that Viking's challenge was "barred as a matter of public policy." Ct. App. Op. at 4 (Addendum 1).

Viking requests Leave to Appeal to this Court only that part of the Court of Appeals' decision rejecting Viking's argument that Ordinance 96-2 was void for failure of the Village to comply with several procedural requirements during the adoption process. In support of this Application for Leave to Appeal, Viking will show, consistent with MCR 7.302(B)(1), that this case, which was brought by a subdivision of the State, raises an issue that has significant public interest. Additionally, that the decision of the Court of Appeals on the issue raised in this Application is clearly erroneous and will cause material injustice within the meaning of MCR 7.302(B)(5). Specifically, the Court's decision will cause material injustice because it allows a

local government to ignore both State and local law governing the procedures for adoption of ordinances. If upheld, the decision would force parties to file lawsuits challenging ordinances even where such ordinances do not yet impact or affect the parties. Under the Court of Appeals' reasoning, unless challenged in court within a short time period after ordinance adoption, such invalidly adopted ordinances will be considered valid and there will be no recourse for those parties to whom the ordinance is first applied some time after its adoption.

The Court's decision is clearly erroneous because it ignores uncontraverted evidence that Viking did not acquiesce to Ordinance 96-2, but rather, provided many notices to the Village of the procedural deficiencies in the ordinance adoption process, all of which the Village ignored. It was only after the Michigan Department of Environmental Quality ("MDEQ") issued Viking a new air permit with revised fuel use limits, and Viking began burning fuels at the levels allowed under its new permit, that Viking ran afoul of the improperly adopted Ordinance 96-2. Moreover, and of particular importance in this context, the Village was not prejudiced by the lapse of time (approximately 3 ½ years) before Viking challenged the ordinance. Schaefer v City of East Detroit, 360 Mich 536, 541; 104 NW2d 390, 392 (1960) (challenge to an ordinance allowed twenty-two years later where there was no evidence of prejudice.).

For the reasons set forth herein, Viking requests that this Court grant Leave to Appeal, and upon leave granted, reverse that portion of the Court of Appeals' order concerning the procedural validity of Ordinance 96-2, and enter a final order that all of Ordinance 96-2 is invalid based on procedural deficiencies in the adoption process.

QUESTION PRESENTED FOR REVIEW

1. Did the Court of Appeals err in holding that Viking was precluded from challenging the validity of Ordinance 96-2 on procedural grounds?

STATEMENT OF PROCEEDINGS AND FACTS

A. THE VIKING PLANT AND STATE PERMITS

Viking owns and operates a state-permitted electrical generating facility located in Lincoln, Michigan. The plant is classified as a "major emitting facility" under Michigan law. (Pl.'s Br. Opp. Def.'s Summ. Disposition[1] at 2) (Addendum 2). The plant began its commercial operation in 1989. The plant initially burned only natural wood as a source of fuel. Viking began exploring the use of alternative fuels, including tire-derived fuels, on trial bases in the early 1990s.

In May 1996, Viking submitted an air use permit application to the Michigan Department of Environmental Quality to burn certain alternative fuels on a regular basis at the Lincoln plant. After an extensive and comprehensive application review, including stack testing, the MDEQ issued air use permit #260-86C to Viking on January 30, 1997, pursuant to Part 55 of the Natural Resources and Environmental Protection Act ("NREPA"). The permit allowed Viking to burn, in addition to natural wood, up to 168 tons per day of creosote-treated wood, 56 tons per day of pentacholorophenol-treated wood, 99 tons per day of particle board/plywood, and 17 tons per day of tire-derived fuel ("TDF"). (Def.'s Br. Supp. Summ. Disposition,[2] Ex. 1, at 5) (Addendum 3).

Three and one half years later, on July 31, 2000, the MDEQ issued air use permit #260-86D to Viking allowing the plant to increase the amount of TDF that it could burn to 44.0 tons

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[1] Plaintiff's Brief in Support of Its Opposition to Viking's Motion for Summary Disposition, Oct. 5, 2002.

[2] Defendant's Brief in Support of Its Motion for Summary Disposition and in Opposition to Plaintiff's Motion for Summary Disposition, Sept. 23, 2002.

per day. The 2000 permit allows the plant to burn natural wood, the same quantity of creosote-treated wood (168.0 tons per day), an increased amount of tire-derived fuel (44.0 tons per day), and reduced quantities of pentachlorophenol-treated wood and particle board/plywood (39.2 tons per day and 19.0 tons per day, respectively). (Def.'s Br. Supp. Summ. Disposition, Ex. 2, at 5) (Addendum 4).[3]

MDEQ incorporated the fuel use limits from Permit No. 260-86D in the plant's final renewable operating permit #199600397 issued to Viking on February 15, 2002. (Def.'s Br. Supp. Summ. Disposition, Ex. 4, at 16) (Addendum 5).

B. THE ADOPTION PROCESS FOR THE VILLAGE'S ORDINANCE 96-2

The Village, a Michigan Municipal Corporation, has authority to adopt and amend ordinances under MCL 125.584 (1997) (amended 2000) (Addendum 9), which sets forth procedural requirements for such adoption and amendment. The Village's own Zoning Ordinance contains Article VII, which provides certain requirements for adopting amendments to that ordinance. (Def.'s Br. Supp. Summ. Disposition, Ex. 5, Art VII) (Addendum 10).

MCL 125.584 sets out a specific list of steps that a village must follow when it proposes to adopt an ordinance. In Korash v City of Livonia, 388 Mich 737, 746; 202 NW2d 803, 807-08 (1972), the Michigan Supreme Court made it clear that a locality must strictly follow these steps to ensure the validity of the ordinance.

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[3] The State of Michigan recognizes that leaving scrap tires across the landscape may cause environmental and health hazards and has expressed its policies concerning scrap tires in the Scrap Tire Act, MCL 324.16901 et seq. (Addendum 6), regulating the collection and disposal of scrap tires and directing MDEQ to aid in developing a market for scrap tires; Section 1003 of the Appropriations Act, 2000 PA 275 (Addendum 7), directing MDEQ to develop a strategy to expand the use of scrap tires; and MDEQ's "Statewide Strategy to Expand the Use of Tire-Derived Fuels" in which the agency lists power plants as the primary market for scrap tires in Michigan. (Def.'s Br. Supp. Summ. Disposition, Ex. 19) (Addendum 8). To the extent that Viking burns tire-derived fuels, such burning implements State policy addressing scrap tires.

In a locality with a planning commission that is tasked to develop an ordinance, such as the Village, Michigan law requires that the Planning Commission shall "make a tentative report and hold at least 1 public hearing before submitting its final report" on the ordinance to the Village Council. MCL 125.584(2) (Addendum 9). A summary of the comments presented at the public hearing must be included when the commission transmits its final report to the Council. Id.

When a protest petition is filed relating to a proposed zoning amendment, two-thirds of the legislative body must vote to adopt the ordinance. Id at 125.584(5) (Addendum 9). The legislative authority of the Village under the 1997 statute was vested in "a council consisting of the president and trustees." MCL 65.1 (1997) (amended 1998) (Addendum 11). The total membership of the Village Council was, in 1997, seven persons. (Hearing Tr.[4] at 59) (Addendum 12).

The Village Zoning Ordinance also includes specific requirements that the Village Council must follow before it can amend the Zoning Ordinance. Section 7.3.2 of the Zoning Ordinance requires that the Village Council "conduct a public hearing before any regulations shall become effective." (Def.'s Br. Supp. Summ. Disposition, Ex. 5 § 7.3.2) (Addendum 10). This public hearing must be noticed at least 15 days prior to the hearing in a newspaper of general circulation in the Village. The Village Council may only adopt an amendment to the Zoning Ordinance after the public hearing. Id. § 7.3.3.

Viking's submittal of its May 1996 permit application to MDEQ to burn alternative fuels triggered a series of meetings and discussions in the Village about the proposed use of these types of fuels. Both the Village Council and its Planning Commission entertained discussions

about the issue. On October 7, 1996, the Village Council voted to authorize the Planning Commission to begin developing an ordinance regulating the use of alternative fuels. (Def.'s Br. Supp. Summ. Disposition at 3 (Addendum 13) & Ex. 6 (Addendum 14)).

A month later, on November 12, 1996, the Village Planning Commission voted to amend the Village Zoning Ordinance and prepare a new ordinance with "stricter standards tha[n] the State" prohibiting the combustion of alternative fuels at Viking's plant and to contact an attorney to draft the proposed ordinance. (Def.'s Br. Supp. Summ. Disposition at 4 n2 (Addendum 13) & Ex. 8 (Addendum 15)). On December 19, 1996, the Planning Commission voted without discussion and without having held a public hearing as required by law, to send a proposed ordinance designed to regulate the location and operating parameters of certain major emitting facilities to the Village Council for approval. (Def.'s Br. Supp. Summ. Disposition at 3) (Addendum 13).

The Village Council noticed a public hearing on the ordinance for January 22, 1997. The Village published the notice in the *Alcona County Review*. (Pl.'s Legal Supplement[5] at 5 (Addendum16)). The notice stated that the public hearing was to be held before the Village Council. (Def.'s Br. Supp. Summ. Disposition, Ex. 13) (Addendum 17). But, in an apparent effort to meet the requirements of MCL 125.584 pertaining to a public hearing before the Planning Commission, the Village held the hearing before the Planning Commission instead of the Village Council. (Def.'s Br. Supp. Summ. Disposition, Ex. 15) (Addendum 18). The Village Council held no public hearings concerning Ordinance 96-2. (Def.'s Br. Supp. Summ. Disposition at 4) (Addendum 13).

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[4] Transcript of Hearing on Motion for Summary Disposition Before the Honorable John F. Kowalski, Oct. 14, 2002.

[5] Plaintiff's Legal Supplement to Plaintiff's Motion for Summary Disposition, Aug. 28, 2002.

There is no evidence that the Planning Commission prepared a *tentative* report, as required by MCL 125.584, and it never forwarded such a report to the Village Council for consideration. Instead, the Village stated in response to Viking's Request for Admissions concerning the tentative report that "Art Sommers [sic] was on the Council and the Planning Commission. Updates and status reports were frequent." (Def.'s Br. Supp. Summ. Disposition at 3 (Addendum 13) & Ex. 9, at 10 (Addendum 19)). The Village also noted that Joan Gonyea served on both the Village Council and the Planning Commission during late 1996 and early 1997, and that she "advised and made reports to the Village Council throughout the development of Ordinance 96-2 including tentative reports on its wording." (Pl.'s Br. Opp. Def.'s Summ. Disposition at 5 (Addendum 2) & Ex. 8 (Addendum 20)). This statement comes from an *unsigned* affidavit for which there is no supporting documentation.

The Planning Commission ignored the requirement of a tentative report and went straight to the final report required by MCL 125.584. The Village states that the Planning Commission prepared a report to the Village Council recommending adoption of the ordinance. (Pl.'s Legal Supplement at 6 (Addendum 16)). The Village's only support was a copy of an unsigned letter from the Chairman of the Planning Commission to the Village Council dated February 3, 1997, the date of the adoption of Ordinance 96-2 by the Village Council. (Pl.'s Legal Supplement, Ex. 4) (Addendum 21).

Viking submitted a protest petition against the proposed ordinance to the Village Clerk on December 31, 1996. (Def.'s Br. Supp. Summ. Disposition, Ex. 10) (Addendum 22). The filing of the protest petition subjected the ordinance adoption process to the voting requirement that two-thirds of the legislative body must approve the proposed ordinance. MCL 125.584(5) (Addendum 9). In addition, Viking filed an appeal to the Zoning Board of Appeals on January

20, 1997. (Def.'s Br. Supp. Summ. Disposition, Ex. 30) (Addendum 23). The Zoning Board of Appeals did not hear the appeal and the Village returned the fee checks for both the appeal and protest petition to Viking without comment. (Def.'s Br. Supp. Summ. Disposition, Ex. 12 (Addendum 24); Tr. Ct. Op.[6] at 16 (Addendum 25)).

On February 3, 1997, several days after Viking received its new MDEQ air use permit allowing it to burn alternative fuels, the Village Council voted to adopt Ordinance 96-2 at one of its regularly scheduled meetings. (Def.'s Br. Supp. Summ. Disposition at 4 (Addendum 13) & Ex. 16 (Addendum 26)). All seven members of the Council, including the president and the six trustees, were present at the meeting, but only four of the seven trustees (less than two-thirds of the trustees as required under MCL 125.584(5)) voted in favor of adopting Ordinance 96-2. (Def.'s Br. Supp. Summ. Disposition, Ex. 17) (Addendum 27). Although state law authorized President Somers to vote on the matter, by Village custom President Somers did not vote on the question of Ordinance 96-2. (Hearing Tr. at 59, 74) (Addendum 12).

Viking repeatedly identified and informed the Village of a number of procedural defects during the ordinance adoption process beginning in the fall of 1996. (Def.'s Br. Supp. Summ. Disposition at 5 (Addendum 13) & Exs. 7, 11, 18A-E (Addenda 28, 23 & 29, respectively)). The Village never corrected the procedural flaws despite Viking's notice.

[6] Opinion, Alcona County Cir. Ct., Dec. 13, 2002.

Table 1 summarizes these procedural violations.

Table 1: Comparison of Procedural Requirements and Village Actions or Lack of Actions

Requirement	Village's Action
MCL 125.584(2) requires a tentative report from the Planning Commission to the Village Council concerning the proposed ordinance	No such tentative report was submitted to the Village Council
MCL 125.584 requires the notice of a public hearing before the Planning Commission	Notice was for meeting to be held before Village Council – Planning Commission ultimately held meeting (no change in notice)
Zoning Ordinance § 7.3.2. requires that Village Council hold public hearing before adopting amendment ordinance	Village Council did not hold public hearing on Ordinance 96-2
MCL 125.584(5) requires 2/3 vote of Village Council to approve ordinance subject to protest petition	Only 4 of 7 (less than 2/3) of the Village Council voted to approve Ordinance 96-2

Ordinance 96-2 purports to amend the Village Zoning Ordinance to regulate the location, fuel stack height, stockpile height, lining of the stockpile, and use of fuels at certain major emitting facilities within the Village. The relevant sections of Ordinance 96-2 are as follows:

> Section 3. No major emitting facility shall combust solid waste or solid waste fuel within 1,000 feet of an occupied residential dwelling, school, day care center, hospital or clinic, church, or nursing home.
>
> Section 4. No solid waste storage pile or solid waste fuel stockpile at a major emitting facility shall be located within 1,000 feet of an occupied residential dwelling, school, day care center, hospital or clinic, church, or nursing home.
>
> Section 5. A solid waste storage or solid waste fuel stockpile at a major emitting facility shall be located on a concrete surface or other surface suitable to prevent infiltration of groundwater by rainwater runoff or leachate from the solid waste pile. No solid waste storage pile or solid waste fuel stockpile shall exceed 40 feet in height.
>
> Section 6. Major emitting facilities which have been validly authorized to combust solid waste or solid waste fuel by a competent State authority as of the effective date of this Ordinance may continue to combust solid waste or solid waste fuel only to the extent authorized by the effective date of this Ordinance. Such combustion is hereby declared to be a non-conforming use under this Ordinance.

(Def.'s Br. Supp. Summ. Disposition, Ex. 16) (Addendum 26). Section 2 of the ordinance defines solid waste and solid waste fuel to include "creosote treated wood, construction and demolition wood, pentachlorophenol treated wood, particle board, plywood, and tire derived fuel." Id.

C. THE VILLAGE'S ENFORCEMENT OF ORDINANCE 96-2

Between February 3, 1997, and July 31, 2000, Viking operated its plant in accordance with Section 6 of Ordinance 96-2 because the ordinance's fuel limits were coterminous with Viking's January 1997 environmental permit issued by MDEQ. Viking was grandfathered with respect to the ordinance's setback provisions as an existing nonconforming use under Section 6.3 of the Village's Zoning Ordinance (Addendum 10). (Trial Ct. Op. at 16 (Addendum 25)). The Village has not attempted to regulate the setback of either the plant or the fuel pile. On July 31, 2000, when MDEQ issued a permit allowing Viking to change the fuel mix including burning a greater quantity of tire derived fuel, Viking, for the first time, faced the situation of operating outside the limits that the Village had attempted to establish in Ordinance 96-2.

The Village, through its counsel, first notified Viking of the plant's alleged violation of Ordinance 96-2 on September 5 and 26, 2000. (Pl.'s App. Br.[7] at 4) (Addendum 30). Viking responded to the Village notifications by letter on October 4, 2000. Letter from Daniel Slone, Esq., McGuireWoods LLP, to Robert Davis, Esq., The Davis Law Group (Oct. 4, 2000) (Addendum 31).

Not satisfied with Viking's response, the Village brought the present action against Viking on December 27, 2000, claiming that Viking's violation of Ordinance 96-2 constituted a nuisance per se "under MCL 125.294 [sic]." Complaint ¶¶ 26, 34 (Plaintiff mistakenly cited to

[7] Plaintiff/Appellant Village of Lincoln's Brief on Appeal, June 5, 2003.

the Township Zoning Act) (Addendum 32). The Village filed a Motion for Preliminary Injunction on August 6, 2001, to enjoin Viking from burning fuels above the levels permitted under the 1997 permit and Ordinance 96-2. On the same day, the Village also filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(10) claiming that there were no genuine issues of material fact and requesting the Court to abate the nuisance per se resulting from Viking's alleged violation of Ordinance 96-2. After the Village filed its Motion for Summary Disposition, the parties agreed to stay the case and attempt to settle their differences.

Between August 2001 and June 2002, the parties conducted various discussions, resulting in an agreement that Viking should submit a request for a variance under Ordinance 96-2. (Trial Ct. Op. at 5) (Addendum 25). Viking did not admit to the validity of Ordinance 96-2 by seeking a variance. (Viking's Claim of Appeal[8] at 2) (Addendum 33). The variance request was denied and further settlement efforts proved unsuccessful. Viking then appealed the denial of the variance request. That appeal was subsequently dismissed as moot when the trial court granted judgment to Viking in the Village's enforcement case.

Viking filed a Motion for Summary Disposition in the Village's case on September 23, 2002, requesting that the Circuit Court hold Section 6 of Ordinance 96-2 invalid on various constitutional grounds and the entire ordinance invalid on procedural grounds. On October 14, 2002, the Circuit Court held a hearing on the pending motions. On December 13, 2002, the Circuit Court granted Viking's Summary Disposition to Viking, denied the Village's Motion for Preliminary Injunction and Summary Disposition, and denied Viking's Claim of Appeal on the variance as moot.

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[8] Viking Energy of Lincoln's Claim of Appeal, File No. 02-11030AA (Alcona Cir. Ct. filed Aug. 12, 2002).

D. THE COURT OF APPEALS' DECISION

The Village appealed the Circuit Court's decision on June 5, 2003. The Court of Appeals heard oral argument in the case on August 3, 2004, and issued an opinion on August 24, 2004. The Court of Appeals upheld the Circuit Court decision that Section 6 of Ordinance 96-2, the section that purported to regulate fuel levels burned at the Viking facility to those permitted by the State as of the adoption date of the ordinance, violated Viking's right to substantive due process because the ordinance was not reasonably related to a legitimate governmental interest. The Court, however, reversed the Circuit Court's decision to the extent it invalidated the entire Ordinance on constitutional grounds. Of significance to this appeal, the Court of Appeals also held that Viking's procedural challenge to the validity of Ordinance 96-2 was barred as a matter of public policy. Viking now applies for Leave to Appeal only that part of the Court of Appeals' decision on issue of its procedural challenge to Ordinance 96-2.

ARGUMENT

Viking is not precluded from challenging the validity of Ordinance 96-2 on procedural grounds. The Village's entire Ordinance 96-2 is invalid because of several procedural defects. Viking identified these defects for the Village during the ordinance adoption process, but the Village, in its haste to adopt the ordinance, ignored the defects resulting in the invalidity of Ordinance 96-2.

A. THE COURT OF APPEALS ERRED IN HOLDING THAT VIKING IS PRECLUDED FROM CHALLENGING ORDINANCE 96-2 ON PROCEDURAL GROUNDS.

The Court of Appeals held that it is too late for Viking to challenge Ordinance 96-2 on procedural grounds. Ct. App. Op. at 4 (Addendum 1). The Court relied on Northville Area Non-Profit Housing Corp v City of Walled Lake, 43 Mich App 424; 204 NW2d 274 (1972), leave to

appeal denied, 389 Mich 768 (1973), City of Jackson v Thompson-McCully Co, 239 Mich App 482, 493; 608 NW2d 531 (2000), and Township of Richmond v Erbes, 195 Mich App 210, 217; 489 NW2D 504 (1992), overruled on other grounds, Bechtold v Morris, 443 Mich 105, 108-109; 503 NW2d 654 (1993). None of these authorities supports the Court of Appeals' decision.

In Northville, the City of Walled Lake, itself, claimed that a zoning amendment was invalid because the City had mistakenly neglected to provide a public notice for a zoning amendment hearing. 43 Mich App at 431-32. Relying on the City's zoning decision at that hearing, Northville purchased property, received a construction loan, and entered into professional service agreements. The court in Northville held that it was contrary to public policy to allow the City, after a period of years, to invalidate its own zoning decision "on the claim that a public official failed to perform that duty which the law imposes upon her." Id at 435. The court based its decision on the fact that Northville had relied on the zoning amendment and on the lack of a showing by the preponderance of the evidence that procedural improprieties had occurred. Plainly, that case does not stand for the proposition that village ordinances are immune to attack from those who can demonstrate procedural defects.

In Jackson, township officials and residents "acted in accordance" with the rezonings in question for ten years, despite the defects of the adoption process. 239 Mich App at 493. The plaintiff in Jackson brought its case nearly ten years after the rezoning, but the court held that the public must be able to rely on zoning amendments that are *unchallenged* for years. Id at 493-94.

In Richmond, the township attempted to rezone agricultural property to residential property in 1978. Between 1978 and 1987, the defendants in the case conducted a pallet assembly operation on the property. In 1987, when the defendants approached the township about a permit to construct a pole barn in conjunction with the pallet assembly process, the

township noted that the use was consistent with agricultural property and approved the building permit. Two months after the pole barn was completed and the approved by the township, the township notified the defendants that the pallet assembly activities were in violation of the township's zoning ordinance. In the resulting case, the defendants argued that procedural flaws in the adoption process of the zoning amendment thirteen years earlier made the amendment invalid. On appeal, the Court of Appeals held that "[w]hen a zoning ordinance has been the subject of public acquiescence and *reliance* for a lengthy time" challenges to the ordinance based on improper procedures during the adoption process are barred on public policy grounds. Richmond, 195 Mich App 210, 217; 489 NW2d 504, 508 (emphasis added).

The facts are different in the Viking case. Unlike the situations in Northville, Jackson and Richmond, the evidence demonstrates that Viking did not wait quietly for years without identifying problems concerning the adoption process of Ordinance 96-2, nor did Viking or anyone else rely on the ordinance. There is no evidence of prejudice.

This Court, in Schaefer v City of East Detroit, 360 Mich 536, 541; 104 NW2d 390, 392 (1960), prohibited a defendant locality from raising the defense of laches, which embodies the factors of delay and prejudice, where property owners affected by a zoning ordinance challenged an ordinance that had been in effect for twenty-two years and neither the locality nor others were prejudiced by the property owners' delayed challenge.

Here, Viking objected to the validity of the adoption process as soon as it identified procedural problems. Viking's counsel sent letters to the Village Council or Village attorney identifying the defects as they arose. (Def.'s Br. Supp. Summ. Disposition, Exs. 7, 11, 18A-E) (Addenda 28, 23 & 29, respectively). In addition, it was not until July 2000, when MDEQ issued the new permit to Viking, that Viking ran up against the limitation of Section 6 of Ordinance 96-

2. It was at this point that Viking's interest in burning fuels, as approved under the air use permit issued by MDEQ in 2000, was adversely affected. As the Circuit Court held:

> Viking identified and pointed out potential problems with the Ordinance to the Village Council throughout the process of adopting the Ordinance. This is evidenced by correspondence between Viking representatives and the representatives of the Village as early as October 1996. In addition, as early as January 1997, before the Ordinance was even enacted by the Village Council, Viking submitted an appeal to the Village of Lincoln Zoning Board of Appeals, contesting actions of the Planning Commission as related to the Ordinance. Viking clearly acted early on in the process to preserve its rights to contest this Ordinance. In addition, even though the Ordinance was enacted in February 1997, and the present suit was commenced in December 2000, Defendant was not granted the new MDEQ permit until July 2000. Prior to the time the new permit was granted, a significant part of Ordinance was not applicable to Viking, as the facility was still operating under the terms of the January 1997 permit. Thus, this Court cannot find that public policy and time bars Viking from challenging the Ordinance in the present suit.

(Trial Ct. Op. at 15-16) (Addendum 25).

Under these circumstances, public policy does not preclude Viking's procedural claim that Ordinance 96-2 is invalid. The Court of Appeals' decision to the contrary is directly in conflict with this Court's decision in Schaefer v City of East Detroit.

B. THE VILLAGE'S ORDINANCE 96-2 IS INVALID BECAUSE THE VILLAGE FAILED TO FOLLOW THE APPROPRIATE PROCEDURES REQUIRED BY STATE LAW AND THE VILLAGE'S OWN ZONING ORDINANCE.

If this Court finds that Viking is not precluded from challenging the validity of the adoption process of Ordinance 96-2, then it is clear that the Ordinance should be declared invalid because the Village Council and the Planning Commission failed to follow clearly specified procedural requirements for public meetings and public notices. Each of the following procedural errors is fatal to the adoption of Ordinance 96-2.

First, the Village failed to follow Michigan law when the Planning Commission did not submit a tentative report to the Council. Michigan law is clear that the Planning Commission "is

required to make a tentative report and hold public hearings prior to filing a final report." City of Ann Arbor v Danish News Co, 139 Mich App 218, 224; 361 NW2d 772, 774 (1984), appeal denied 424 Mich 863 (Dec. 18, 1985). There is no evidence that any tentative report, including the statutorily required summary of public comments from the public hearing, was prepared. The broad, unsupported statement by the Village that "Art Sommers [sic] was on the Council and the Planning Commission. Updates and status reports were frequent," (Def.'s Br. Supp. Summ. Disposition, Ex. 9) (Addendum 19), certainly does not suffice. The Village also notes that Joan Gonyea served on both the Village Council and the Planning Commission during late 1996 and early 1997, and that she "advised and made reports to the Village Council throughout the development of Ordinance 96-2 including tentative reports on its wording." (Pl.'s Br. Opp. Def.'s Summ. Disposition at 5 (Addendum 2) & Ex. 8, at 2) (referencing an unsigned affidavit for which there is no supporting documentation) (Addendum 20). That, too, is insufficient. Because the Planning Commission did not prepare a tentative report, Viking was denied an opportunity to be both informed and in a position to counter the probable recommendation on Ordinance 96-2 by the Planning Commission to the Village Council.

Second, the Planning Commission did not properly notice its January 22, 1997, public hearing. The public notice stated that the *Village Council* would hold a public hearing on January 22. (Def.'s Br. Supp. Summ. Disposition, Ex. 13) (Addendum 17). Instead, at the last minute, the *Planning Commission* held the public hearing. It is obvious that the Village was attempting to meet the requirement of MCL 125.584 that the Planning Commission hold a hearing, but it was an unsuccessful effort. The Village did not correct the public notice for the January 22, 1997, hearing and it did not hold any additional hearings on the matter.

Third, the Village Council did not hold a public hearing as required by its own Zoning Ordinance. The Village's Zoning Ordinance requires that, "[a]fter deliberations on any proposal, the Village Council *shall* conduct a public hearing before any regulations shall become effective." (Def.'s Br. Supp. Summ. Disposition, Ex. 5 § 7.3.2) (emphasis added) (Addendum 10). The Village Council held no such public hearing on Ordinance 96-2.

Fourth, the Council adopted Ordinance 96-2 with less than two-thirds of the seven-member legislative body voting to adopt the ordinance. Michigan law requires that two-thirds of a legislative body must approve an ordinance that is subject to a protest petition. MCL 125.584(5) (Addendum 9). Viking filed a protest petition on Ordinance 96-2 on December 31, 1996. (Def.'s Br. Supp. Summ. Disposition, Ex. 10) (Addendum 22). On February 3, 1997, six of the seven members of the legislative body cast votes on Ordinance 96-2. Although present, President Somers did not vote. The record shows that only four members of the Council voted to approve the ordinance. (Def.'s Br. Supp. Summ. Disposition, Ex. 17, at 2) (Addendum 27). Because two-thirds (or five) of the seven-member Village Council did not vote to approve Ordinance 96-2, the Ordinance is plainly invalid.

In its prior briefs and at the hearing on the motions, the Village argued that it was the Village's custom for the President to vote only in case of a tie. (Hearing Tr. at 59) (Addendum 12). While this is an interesting custom, it is irrelevant when a village votes to adopt an ordinance that is the subject of a protest petition. In that situation, the statute requires approval of 2/3 of the entire legislative body before the ordinance can be adopted. If one additional trustee had voted to approve Ordinance 96-2, so that the vote was five of the entire seven members of the Council in favor of the ordinance, the fact that the President refrained from voting would not have been an issue. But that did not happen. The statute does not give the

Village the option of reducing the statutory requirement by relying on its custom when proposed ordinances are subject to protest petitions. Therefore, Ordinance 96-2 is invalid.

This Court has held that an act of the legislature is presumed valid unless irregularities are affirmatively shown. City of Lansing v Michigan Power Co, 183 Mich 400, 405; 150 NW 250, 251 (1914). As described above, Viking affirmatively proved irregularities in the Ordinance 96-2 adoption process. Because the Village did not follow the strict requirements of Michigan law or its own Zoning Ordinance and did not take the steps necessary to correct these irregularities, because Viking has shown the existence of irregularities in the adoption process, and because there is no evidence of reliance, it is clear that Ordinance 96-2 should be declared invalid as a matter of law. Schaefer v City of East Detroit, 360 Mich 536, 541; 104 NW2d 390, 392 (1960).

In sum, local governments are authorized to adopt ordinances providing extensive regulation of activities within their borders. One of the protections available to citizens against overreaching is the assurance that the government must comply with statutorily prescribed processes designed to provide notice, the opportunity to be heard, and the requisite vote to adopt the proposal. Here, the Village wholly ignored these vital protections and this Court's dictate that they be strictly followed. Because this Court's decision in Schaefer mandates that Viking's challenge to this failure be considered, Viking asks this Court for the following relief.

RELIEF REQUESTED

The Village of Lincoln's Ordinance 96-2 is invalid in its entirety for procedural reasons. For the reasons set forth above, Viking respectfully requests that this Court:

A. Grant this Application for Leave to Appeal;

B. Upon leave granted, reverse that portion of the decision of the Court of Appeals on the issue of the procedural validity of Ordinance 96-2 based on flaws in the adoption process for the ordinance;

C. Enter an Order stating that Ordinance 96-2 is invalid in its entirety; and

C. Enter any other relief in favor of Viking as this Court deems equitable and appropriate under the circumstances.

Respectfully submitted,

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